**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 3381 OF 2007**

Din Mohamed Haji Yaar Mohamed .... Petitioners
& Anr.
Vs.

Shri Onkar Sonu Mali & Anr. .... Respondents

Mr. M.M. Sathaye for the Petitioners.
Mr. N.R. Bubna for Respondent

**CORAM : A.S. OKA, J.**
**DATE : 9TH JULY, 2007**

P.C.

1) Rule. Learned Advocate for the 1st and 2nd Respondents waives service. Taken up for hearing forthwith.

2) Petitioners are the original plaintiffs. On 23rd June 2006, the suit filed by the plaintiffs was dismissed for default by the learned Civil Judge, Senior Division, Malegaon. While dismissing the suit, the learned Trial Judge noted that on the earlier date, the Petitioners were directed to adduce the evidence and no application for adjournment was filed on behalf of the Petitioners. On the very day, an application was made by the Petitioners for restoration of the suit and an affidavit of the 1st Petitioner in support of the

said application was filed in which it was contended that he had suffered a fracture of hip bone and he was lying on the bed.

3) On 28th June 2006, the learned Trial Judge rejected the said application, therefore, an appeal was preferred by the Petitioner before the District Court. By the impugned order, the said appeal has been dismissed.

4) I have heard the learned counsel appearing for the parties. The petition is opposed by the learned counsel for the Respondents by pointing out that the Appellate Court has observed that the Medical Certificate produced by the Petitioners was doubtful. He pointed out that the said Certificate records that on the day the suit was dismissed, the 1st Petitioner was admitted as indoor patient at 9 am and was discharged at 2 pm. He, therefore, submitted that no interference was called for.

5) I have considered the submissions. The fact remains that on the very day the suit was dismissed, an application for restoration was made by the Petitioners. In view of the decision of this Court in the case of Chhotalal Mohanlal vs. Ambalal Hargovan (AIR 1925 Bom., page 423) in

the normal course, the Trial Judge ought to have restored the suit as the application for restoration was made on the very day on which the suit was dismissed.

6) The Appellate Court has observed that on 2 or 3 dates prior to the date on which, the suit was dismissed, none had appeared for the Petitioners. Considering the fact that an application for restoration was made on the same day, the Courts below ought to have restored the suit subject to payment of costs to the Respondent- defendant.

7) The petition must succeed and I pass following order :

**O R D E R**

i) The impugned orders are quashed and set aside and special Civil Suit No. 56 of 2003 is restored to the file of the Trial Court subject to Petitioners paying costs of Rs.2,500/- to the Respondents within a period of eight weeks from today. The deposit of the amount with the Trial Court within the stipulated period will be treated as a sufficient compliance.

ii) The Petitioners will ensure that no adjournment is sought on any unreasonable ground.

iii) The Petitioners through their Advocate assure this Court to co-operate with the Trial Court for expeditious disposal of the suit.

iv) Rule is made absolute in above terms.

v) Parties to act on an authenticated copy of this order.

**(A.S. OKA, J.)**